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BY HAND DELIVERY
The Honorable Leonard D. Wexler
United States District Court
Eastern District of New York
944 Federal Plaza
Central Islip, New York, NY 11722

Re: *Gerard DePascale, et al. v. Sylvania Electronic Products, Inc., et al.*
CV-07-3558 (LDW) (ARL)

Dear Judge Wexler:

In compliance with Rule 2(B) of Your Honor's Rules, defendants hereby request a pre-motion conference in connection with their contemplated motion to dismiss pursuant to Fed. R. Civ. P. 12(b) and set forth the anticipated bases for that motion in this letter.

Plaintiffs allege that, beginning in or about 1952, defendant Sylvania Electric Products, Inc. operated a "nuclear fuel rod production facility" in Hicksville, New York, using "radioactive uranium and thorium as well as industrial solvents." Cplt. ¶¶ 4, 7. Plaintiffs claim that, during the manufacturing process, "industrial solvents and radioactive substances" "were discharged into the ground at the Hicksville property" and "remained in toxic form . . . until at least 2003." Cplt. ¶ 8. Plaintiffs Gerard DePascale and Liam Neville allege that they were employees of Magazine Distributors, Inc. and worked in its warehouse on the Hicksville property, where they assert they encountered "exposed, contaminated dirt," as well as "toxic puddles" created by an overflowing water drain. Cplt. ¶¶ 12-13.

Plaintiff Gerard DePascale alleges that he was diagnosed in January 2006 with extraskeletal mixoid chondrosarcoma, a form of cancer. Cplt. ¶ 14. Plaintiff Neville alleges that he was diagnosed in August 2004 with membranous nephropathy, a kidney disease. Cplt. ¶ 15. Both plaintiffs' doctors purportedly believe that the illnesses were "caused by exposure to radiation and toxic chemicals." Cplt. ¶¶ 14-15. The third plaintiff, Joanne DePascale, brings her claims as the spouse of Gerald DePascale. Cplt. ¶ 1.

The Complaint asserts six causes of action: strict liability, premises liability, successor liability, negligent infliction of emotional distress, loss of consortium, and punitive damages. At this juncture, defendants anticipate moving to dismiss the Complaint on two principal grounds.

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First, the state law claims are preempted by the federal Price-Anderson Act, which encompasses all legal liability from a "nuclear incident" such as at issue here, and plaintiffs have failed as a matter of law to state an adequate Price-Anderson claim. Second, plaintiffs' state law claims suffer from other fatal defects that independently require dismissal as a matter of law.

Price-Anderson Claims. Over the past 50 years, the federal government has regulated the processing of nuclear materials through a comprehensive scheme that has preempted states from regulating nuclear safety. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983). In particular, the Price-Anderson Act was intended to "supplant all possible state causes of action" by "creat[ing] a federal cause of action. . . and channel[ing] all legal liability . . . through that cause of action." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856-57 (3d Cir. 1991).

Plaintiffs allege that they suffered injury caused by exposure to radioactive substances at the Hicksville property. Cplt. ¶¶ 1, 7-16. Given the nature of plaintiffs' allegations, this case is deemed a Public Liability Action ("PLA") under the Price-Anderson Amendments Act, 42 U.S.C. §§ 2011 *et seq.* A PLA is any suit asserting "public liability"-- *i.e.,* legal liability arising out of or resulting from a "nuclear incident." 42 U.S.C. §§ 2014(hh), (w). A "nuclear incident," in turn, is defined as "any occurrence . . . causing bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). Significantly, every Circuit Court of Appeals to analyze the Price-Anderson Act has interpreted section 2014 broadly to preclude any potential application of state tort law that would be inconsistent with the pervasive federal regulatory dominance over the field of nuclear power. *See, e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994); *TMI II*, 940 F.2d at 854-55. As the *TMI II* court summarized, "[a]fter the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all.***" 940 F.2d at 854 (emphasis in original).

Accordingly, plaintiffs here can proceed only by asserting a valid PLA claim and alleging (1) exposure to radioactive material, (2) resulting in a radiation dose in excess of the applicable federal permissible dose limits, that (3) caused personal injury. *See, e.g., Roberts*, 146 F.3d at 1308. Federal law exclusively sets radiation dose standards for permissible releases from nuclear facilities, with the published dose limits in place at the time of the alleged release establishing the sole standard of care. *See, e.g., O'Conner*, 13 F.3d at 1105. Thus, plaintiffs cannot state a PLA claim unless they plead the three prima facie elements identified above. Plaintiffs here have not alleged a breach of the federal permissible dose limits and therefore have failed to state a claim as a matter of law.

State Law Claims. Because a PLA is the sole cause of action authorized by Congress for claims based on exposure to radioactive materials, plaintiffs cannot maintain claims under state laws that set standards of care different from the controlling standard of care established by federal regulatory dose limits. Plaintiffs' state law claims, however, seek to impose liability based on state law standards of care that are "inconsistent with" the federally mandated standard of care. 42 U.S.C. § 2014(hh). Those state law causes of action are therefore preempted and should be dismissed. *See, e.g., Nieman*, 108 F.3d at 1553 (Price-Anderson Act preempts state law claims, which cannot stand as separate causes of action); *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457, 465 & n.7 (S.D. Cal. 1996) ("applying the 'ultrahazardous activities' doctrine here would be clearly inconsistent with the Price-Anderson Act, as it would make nuclear power plant licensees strictly liable without the 'safe haven' provided by the dose limits regulations").

Specifically, plaintiffs' first cause of action (strict liability) must be dismissed because it seeks to render defendants liable without establishing that they breached the federal permissible dose limits, the sole standard of care under the Price-Anderson Act. Similarly, the second (premises liability) and fourth (negligent infliction of emotional distress) causes of action seek to hold defendants to a negligence-based standard of care, which is impermissible because the duty of care is set solely by the applicable federal dose limits. Plaintiffs' third cause of action for successor liability fails as a matter of law for two independent reasons: because there can be no successor liability given the failure of plaintiffs' underlying claims, and because plaintiffs fail adequately to allege any exception to the general rule of non-liability for successor corporations. *See, e.g., Network Enter., Inc. v. APBA Offshore Prods., Inc.*, No. Civ.A 01-11765, 2002 WL 31050846, at *7 (S.D.N.Y. Sept. 12, 2002). The fifth cause of action for loss of consortium fails because, as a derivative claim, it is dependent on the validity of Gerald DePascale's state law claims -- which, as outlined above, are inconsistent with the Price-Anderson Act and must be dismissed. Plaintiffs' sixth cause of action fails because no independent cause of action exists for punitive damages and because punitive damages are not recoverable in a PLA. Finally, defendants anticipate challenging whether plaintiffs have named and served the proper parties as defendants.

We thank the Court for its consideration and are prepared to address these issues at the Court's convenience.

Respectfully submitted,

/ss/ *Robert L. Folks*
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cc: Counsel of Record (By Telecopy and Overnight Delivery)